

**An Introduction to Core Concepts and Objectives:  
What are Traditional Knowledge, Genetic Resources and  
Traditional Cultural Expressions and  
Why Should They Receive Legal Protection?**

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## **WHAT IS TRADITIONAL KNOWLEDGE AND WHY IT SHOULD BE PROTECTED**

### **INTRODUCTION**

Recent (and ongoing) WIPO initiatives utilise the terms “traditional cultural expressions or expressions of folklore”<sup>1</sup> and “traditional knowledge”, and at the same time, reflect both a distinction and a relationship between them.<sup>2</sup> According to WIPO, the Draft WIPO Instruments under consideration, one dealing with traditional cultural expressions<sup>3</sup> and the other with traditional knowledge,<sup>4</sup> have been developed in response to the specific legal and policy questions raised by these two areas.<sup>5</sup> There is, however, no settled legal definition for either term.<sup>6</sup> “Traditional knowledge”, in its broad sense, unlike “intellectual property”, is a relatively

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<sup>1</sup> The term “traditional cultural expressions/expressions of folklore” is used by WIPO to denote the interchangeability of its components.

<sup>2</sup> See WIPO Secretariat, “Traditional Cultural Expressions/Expressions of Folklore-Legal and Policy Options”, IGC Sixth Session, Geneva, March 15 to 19, 2004, WIPO/GRTK/IC/6/3 at pp.11-12. Johanna Gibson suggests that while the distinctions drawn between traditional cultural expressions and traditional knowledge may seem relevant within the categories of the intellectual property model, the relevance of this distinction to the concerns of indigenous and traditional communities may be less likely where biological and technological resources are related to the cultural expression, knowledge, or practice that facilitates the cohesion and integrity of a particular group: see Johanna Gibson, “Intellectual Property Systems, Traditional Knowledge and the Legal Authority of Community” (2004) Vol.26 (7) E.I.P.R.280.

<sup>3</sup> See the Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore (the Draft TCE Instrument).

<sup>4</sup> See the Draft Provisions for the Protection of Traditional Knowledge (the Draft TK Instrument). The Draft TCE Instrument and the Draft TK Instrument are collectively referred to as the Draft WIPO Instruments.

<sup>5</sup> Some jurisdictions, for example, protect both traditional cultural expressions and traditional knowledge in a single instrument, while others use a range of laws and instruments to address the two areas distinctly. Prior to the arrival of some level of consensus regarding terminology (and protection measures) by the IGC, the terminology used in national and international discourse could be described as “fluid”. The initial appearance and evolution of traditional knowledge as “folklore” in national and international discourse (the Tunis Model); the eclipsing of “folklore” by “traditional knowledge”; the re-emergence of folklore as traditional cultural expressions/ expressions of folklore as part of the folklore/traditional knowledge bifurcation; and the convergence of folklore and traditional knowledge; are all reflective of this fluidity in the discourse.

<sup>6</sup> See “Concept Note – Legal and Policy Options for the Legal Protection of Traditional Knowledge and Expressions of Folklore/Traditional Cultural Expressions” prepared by the International Bureau of WIPO, WIPO/GRTK/KIN/08/1, at p.4.

new concept in legal discourse. In fact, one writer remarked that traditional knowledge is a “modern invention”.<sup>7</sup> Not surprisingly, there is a wide variety of definitions for that term.

This paper will explore two issues, namely, how traditional knowledge is defined, and why it should be protected. Further, the term “traditional knowledge” will be used in its broad sense to include the artistic and technical manifestations of such knowledge except where other terms are used such as “traditional cultural expressions”, “expressions of folklore” or “traditional knowledge associated with genetic resources” where the context requires this.

## **DEFINING TRADITIONAL KNOWLEDGE**

### **Defining “traditional knowledge” conceptually**

Common to most if not all the definitions are (i) the origin of the knowledge traceable to a particular people, group or community usually described as “indigenous” or “traditional” and more recently “cultural”; (ii) the collective characteristics of traditional knowledge; (iii) the oral nature of that knowledge and the oral transmission of that knowledge; (iv) the intergenerational nature of that knowledge; and (v) the importance of context in defining traditional knowledge. Implicit in all definitions, and explicit in some, is the capability of the particular people, group or community to define what constitutes their knowledge.<sup>8</sup> In addition, the linkage of traditional knowledge to the identity of the source group or community is implicit (and at times explicit) in some definitions.<sup>9</sup>

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<sup>7</sup> See Madhavi Sunder, “The Invention of Traditional Knowledge” UC Davis Legal Studies Research Paper Series, Research Paper No.75, March 2006 <http://ssrn.com/abstract=890657> at p.16.

<sup>8</sup> In the WIPO Report, it is expressly stated that WIPO’s description of the subject matter of traditional knowledge reflected its intellectual property focus and acknowledged the right of indigenous groups, local communities and other traditional knowledge holders to decide what constituted their own knowledge, innovations, cultures and practices, and the way they should be defined: see *The Intellectual Property Needs and Expectations of Traditional Knowledge Holders*, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), Geneva, 2001 at p.25 (“the 2001 WIPO Report”).

<sup>9</sup> As Matthias Leistner writes,

“...[T]raditional knowledge systems ...are inextricably interwoven with historical, ethical and religious aspects that touch at the very identity of the respective indigenous group or local community. In this way artistic creations and even practical innovations are often at the same time ‘symbolic of a deeper order or belief system’”: see Matthias Leistner, “Part III Analysis of Different Areas of Indigenous Resources, Section I, Traditional Knowledge, Findings at the Factual Level, Characteristics of Traditional Knowledge” in Silke von Lewinski, ed., *Indigenous Heritage and Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore* (The Hague, The Netherlands: Kluwer Law International, 2004) at pp.56-57 (notes excluded).

***The origin of the knowledge traceable to a particular people, group or community described as “indigenous” or “traditional”***

The association of knowledge with a “traditional or indigenous community or people” is a common feature of definitions of traditional knowledge. Paul Kuruk observes that there is a tendency to frame the debate in terms of the rights of indigenous peoples, “where that term is taken to refer only to certain minority groups in the Americas and Australia.”<sup>10</sup> This influences the ways in which knowledge from such communities is defined, and may have the effect of excluding knowledge originating from, and equally important to, source communities (and even countries) which may not be characterized as “indigenous” or “traditional”. While “indigenous” or “traditional” communities or groups are the constituents for whom protection is usually discussed in the context of the protection of traditional knowledge, “local communities” and “cultural communities” have been increasingly a part of the discourse.

Article 2 of the Draft TCE Instrument, for example, adds the term “cultural communities” to “indigenous peoples and traditional communities” as potential beneficiaries of protection. That term is deemed to be broad enough to include “the nationals of an entire country...[or] a ‘nation’” (as stated in the accompanying commentary), in cases where the traditional cultural expression is regarded as “national folklore” and “belonging to all the people of a particular country.”<sup>11</sup>

***The collective characteristics of traditional knowledge***

The “collective” and “cumulative” characteristics of traditional knowledge are often emphasized which suggests the possibility of constructing “a kind of group epistemology” which explains traditional knowledge as a kind of knowledge that is known in a collective sense across generations and through initiation to a group consciousness.<sup>12</sup> However, Anthony Taubman

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<sup>10</sup> See Paul Kuruk, “Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States, (1998-1999) Vol.48 American University Law Review, 769 at p.839.

<sup>11</sup> See WIPO Secretariat, “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles” IGC Ninth Session, Geneva, April 24<sup>th</sup> to 28<sup>th</sup>, 2006, WIPO/GRTKF/IC/9/4, Annex, at p.17 (“WIPO/GRTKF/IC/9/4”).

<sup>12</sup> See Anthony Taubman, “Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge” in Keith E. Maskus and Jerome H. Reichman, *International Public Goods and Transfer*

warns that the collective characteristic of traditional knowledge should not be pushed too far as it would neglect the role and rights of individuals. Matthias Leistner, for instance, refers to a “flexible combination of individual and collective elements” in the development of traditional knowledge which can result in multiple models of ownership “depending on the predominance of either collective or individual contributions. Thus the owning collective is not necessarily the whole local community but may also be a moiety, a clan, a phatry, a lineage, a society (or sodality) or a single household. And even individuals – for example, shamans and/or healers in certain Indian tribes – can distinguish themselves in some cases as separate creators or inventors, although this role is very often embedded in the social life of the respective community, therefore reducing the ‘owner’ to the function of an ‘organ’ of the community.”<sup>13</sup>

***The oral nature of traditional knowledge and the oral transmission of that knowledge***

June George remarked that indigenous knowledge is typically passed on from one generation to the next in the oral mode, although, within recent times, there have been concerted efforts to document and store such knowledge.<sup>14</sup> In addition to oral transmission, traditional knowledge may be passed on through demonstration and experience. Paul Sillitoe, in writing about the problems that attend the interpretation and analysis of indigenous knowledge, in terms accessible and relevant to those outside the community from which the knowledge originated, remarked that not all aspects of such knowledge can be easily reduced to words because not all knowledge is communicated orally. “People transfer much knowledge between generations by tradition learnt and communicated through practical experience and are not familiar with trying to express everything they know in words. Heirs to effective systems of natural resource exploitation that have evolved over many generations of experimentation, local farmers may follow practices that

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*of Technology Under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005) at p.536.

<sup>13</sup> See Matthias Leistner, “Part III Analysis of Different Areas of Indigenous Resources, Section I, Traditional Knowledge, Findings at the Factual Level, Characteristics of Traditional Knowledge” in Silke von Lewinski, ed., *Indigenous Heritage and Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore* (The Hague, The Netherlands: Kluwer Law International, 2004) at p.57 (notes excluded).

<sup>14</sup> See June M. George, “Indigenous Knowledge as a Component of the School Curriculum” in Ladislaus M. Semali and Joe L. Kincheloe, eds, *What is Indigenous Knowledge? Voices from the Academy* (New York: Falmer Press, 1999) at p.80.

have agro-ecological implications, sometimes apparently without any need of analytical discourse...Knowledge is passed on by informed experience and practical demonstration; more often shown than articulated, it is as much skill as concept.”<sup>15</sup>

### ***The intergenerational nature of traditional knowledge***

Definitions of traditional knowledge tend to refer to the passage of knowledge through generations.<sup>16</sup> This infers that the knowledge, or the forms in which it is expressed, is not new. The antiquity of traditional knowledge is sometimes expressly stated in definitions, as in the case of the Panamanian Law No.20 of June 26, 2000 on the Special Intellectual Property Regime Governing Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge (the “Panamanian Law”), which defines “traditional knowledge” as the “collective knowledge of an indigenous people based on the traditions of centuries, and indeed millennia.”<sup>17</sup>

A view which has entered the legal discourse on the protection of traditional knowledge is that what makes knowledge “traditional” *is not the age of the knowledge but the means by which it is transmitted.*<sup>18</sup>

Graham Dutfield has stated that it was incorrect to assume that the term “traditional” meant or necessarily implied “outdated”.<sup>19</sup> In support of this view, he referred to the statement by the Four Directions Council submitted to the Secretariat for the CBD, namely, that “what is

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<sup>15</sup> See Paul Sillitoe, “The Development of Indigenous Knowledge: A New Applied Anthropology” (1998) Vol.39 No.2 Current Anthropology, 223 at 229 (citation excluded).

<sup>16</sup> See WIPO Secretariat, “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles” IGC Ninth Session, Geneva, April 24 to 28, 2006, WIPO/GRTKF/IC/9/4, Annex, at pp.15-19 for examples of legislative provisions which include this requirement in relation to traditional cultural expressions. “It is generally considered by experts that materials which have been maintained and passed between three, or perhaps two, generations form part of ‘heritage’”: *ibid.*, at p.13. See also Edward Shils, *Tradition* (London: 1981) at p.15, where he states that like “heritage” a tradition (and by extension, those practices and material objects in which the tradition is manifested) can only be defined when it has been transmitted at least twice across three generations.

<sup>17</sup> See Chapter 1, Article 2 (iii) of the Executive Decree No.12 of March 20<sup>th</sup>, 2001 to the Panamanian Law.

<sup>18</sup> See the statement by the Four Directions Council submitted to the Secretariat for the Convention on Biological Diversity (“the CBD”), which has been cited by Graham Dutfield and others.

<sup>19</sup> See Graham Dutfield, “TRIPS-Related Aspects of Traditional Knowledge” (2001) 33 Case W.Res. J. of Int’l L. 233 at p.242.

‘traditional’ about traditional knowledge is not its antiquity, but the way it is acquired and used. In other words, the social process of learning and sharing knowledge, which is unique to each indigenous culture, lies at the very heart of its ‘traditionality’. Much of this knowledge is actually quite new, but it has a social meaning, and legal character, entirely unlike the knowledge indigenous people acquire from settlers and industrialized societies.”<sup>20</sup> Dutfield’s analysis of article 8(j) of the CBD also suggested that the term “traditional” should not be interpreted as static. The relevant part of that article states that State Parties to the CBD are required to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles.” He stated that the use of the terms “knowledge”, “innovations” and “practices” juxtaposed with the term “traditional” suggests that that term ought not to be understood as “historical”, “inflexible” and “static”. “Traditional innovations” is not an oxymoron.<sup>21</sup> Thus there is the ability of traditional knowledge to change with the change in circumstances of the relevant people, group, community or region.

### ***The importance of context in defining traditional knowledge***

“Context” has been identified as an important factor in defining traditional knowledge since such knowledge has been considered to be unique to given cultures, localities, and societies.<sup>22</sup> June George explains indigenous knowledge as “knowledge that has evolved in a particular societal context which is used by lay people in that context in the conduct of their lives.”<sup>23</sup> She explains further that while indigenous knowledge is generated in specific local contexts in response to specific local problems, it is often influenced by knowledge generated in other settings.<sup>24</sup> Also,

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<sup>20</sup> See the Four Directions Council Forests, Indigenous Peoples and Biodiversity: Contribution of the Four Directions Council: Submission to the Secretariat for the Convention on Biological Diversity, 1996.

<sup>21</sup> See Graham Dutfield, “The Public and Private Domains: Intellectual Property Rights in Traditional Ecological Knowledge” WP 03/99, OIPRC Electronic Journal of Intellectual Property Rights, <<http://www.oiprc.ox.ac.uk/EJWP0399.html>> at p.4.

<sup>22</sup> See George J. Sea Dei, Budd L. Hall, and Dorothy Goldin Rosenberg, eds, *Indigenous Knowledges in Global Contexts: Multiple Readings of our World* (Toronto: Buffalo; London: Published in Association with the University of Toronto Press: 2000) at p.19.

<sup>23</sup> See June M. George, “Indigenous Knowledge as a Component if the School Curriculum” in Ladislaus M. Semali and Joe L. Kincheloe, eds, *What is Indigenous Knowledge? Voices from the Academy* (New York: Falmer Press, 1999) at p.80.

<sup>24</sup> *Ibid.*

Anthony Taubman suggests that the social structures that create, use, preserve and pass down traditional knowledge between generations, as well as the customary laws and protocols that govern these processes, are deeply rooted in their traditional location and community setting, and may be conceived as integral to the land and environment itself.<sup>25</sup>

However, Arun Agrawal, in questioning the classification of knowledge into “western” and “indigenous”, critiqued the view that indigenous knowledge exists in a local context “anchored to a particular social group in a particular setting at a particular time” while western knowledge was “divorced from an epistemic framework in search for universal validity” and suggested that the latter (that is, “western knowledge”) is “as anchored in a specific milieu as any other system of knowledge.”<sup>26</sup> Further, for those who adhere to radical pragmatism, all knowledge is contextual, relative and subjective.<sup>27</sup>

### **Defining “traditional knowledge” descriptively**

The Draft WIPO Instruments, for example, include definitions for “traditional cultural expressions” and “traditional knowledge”, reflecting, in general, a separation of the artistic and technical manifestations of traditional knowledge. “Traditional cultural expressions” include stories, music, songs, ceremonies, sculpture and art,<sup>28</sup> while “traditional knowledge includes

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<sup>25</sup> See Taubman, Anthony. “Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge” in Keith E. Maskus and Jerome H. Reichman, *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005) at p.524 (“Saving the Village”).

<sup>26</sup> See Arun Agrawal, “Indigenous and Scientific Knowledge: Some Critical Comments” *IK Monitor* (1995) 3(3) at p.3.

<sup>27</sup> See Adam D. Moore, “Intellectual Property: Theory, Privilege, and Pragmatism” (2003) Vol. XVI *Canadian Journal of Law and Jurisprudence*, 191 at p.194, where he looked at the nature and definition of economic pragmatism in the context of intellectual property.

<sup>28</sup> See Article 1 of the Draft TCE Instrument which states as follows:

(a) “Traditional cultural expressions” or “expressions of folklore” are any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

- (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
- (ii) musical expressions, such as songs and instrumental music;
- (iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and
- (iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;



knowledge resulting from intellectual activity in a traditional context in any technical field including the agricultural, environmental, and medicinal spheres.<sup>29</sup>

How one defines “traditional knowledge” can influence the kinds of policy options and protection measures which may be suitable. The converse is also true in that policy options and protection measures also influence how “traditional knowledge” is defined.<sup>30</sup>

### **Defining “traditional knowledge” in the Caribbean context**

Prior to the development of the Draft WIPO Instruments (an activity which is ongoing), a range of subject matter was identified as constituting traditional knowledge during a Fact-finding Mission to the Caribbean Region (the Caribbean FFM) conducted by WIPO from May 30<sup>th</sup> to June 9<sup>th</sup>, 1999. The countries visited were Guyana, Jamaica, and Trinidad and Tobago.<sup>31</sup> That mission was one of several missions conducted in different regions of the world to “enable

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which are

- (aa) the products of creative intellectual activity, including individual and communal creativity;
- (bb) characteristic of a community’s cultural and social identity and cultural heritage; and
- (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

<sup>29</sup> See Article 3 (2) of the Draft TK Instrument which provides, *inter alia*, the term “traditional knowledge” refers to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.

<sup>30</sup> In the WIPO report entitled “Traditional Knowledge – Operational Terms and Definitions”, it was observed that the concept of traditional knowledge in the national, regional and international forums, tend to be shaped by the policy framework governing that forum. As a result, there is a decentralised and disintegrated set of approaches in which the relevant issues are subject to differing policy considerations, cultural environments and analytical tools. Different terms can therefore be used for overlapping subject matter, and the same term may be used in contrasting ways: WIPO Document “Traditional Knowledge – Operational Terms and Definitions WIPO/GRTKF/IC/3/9 at para. 15.

<sup>31</sup> The countries of the Caribbean which comprise the Caribbean Community established by the Treaty of Chaguaramas are Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

WIPO to identify, as far as possible, the ...[intellectual property] needs and expectations of ...[traditional knowledge] holders”.<sup>32</sup>

The subject matter identified during that Caribbean FFM included subject matter typically associated with traditional cultural expressions as well as traditional knowledge.<sup>33</sup> The need for a commonly agreed definition of traditional knowledge was identified in the 2001 WIPO Report, and this seems to remain a challenge for the region.

A brief comment will be made about defining “traditional knowledge” in the Caribbean in the context of the definitions which are proposed in the Draft WIPO Instruments.

Many of the “traditions” found in the Caribbean originated elsewhere.<sup>34</sup> As Professor Rex Nettleford writes “the Caribbean is the story of ‘arrivants’ from across the Atlantic and beyond, each group bringing a cultural equipage”<sup>35</sup> and building their own institutions with their

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<sup>32</sup> See Intellectual Property Needs and Expectations of Traditional Knowledge Holders. WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) (Geneva, 2001) at p.17 (the 2001 WIPO Report).

<sup>33</sup> The subject matter identified as constituting “traditional knowledge” includes

- Traditional usage of fruits, plants and animals for medicinal purposes;
- Spiritual healing;
- Traditional fishing methods;
- Traditional birthing methods;
- Traditional bone setting techniques;
- Cultural heritage;
- Folksongs, dances and dramas;
- Rites and rituals;
- Traditional psychiatry;
- Religion;
- Trapping, hunting and fishing techniques;
- Traditional food culture and preservations techniques;
- Handicrafts;
- Traditional environmental preservation and conservation methods;
- Language.

<sup>34</sup> The 2001 WIPO Report, at p.194, referred to this issue in the context of ownership of traditional knowledge. It stated that “most Caribbean people have their origins in Africa, Asia [Europe] and South America. The discussion on this point centred around whether the Caribbean people could lay claim to benefits accruing from the use of knowledge which they brought with them from their countries of origin. The arguments were skewed in favour of the true beneficiaries being the source communities from which these knowledge systems originate. However, many recognised that the knowledge formations had evolved and that although they could have had roots in their countries of origin, they can now be identified with the Caribbean.”

<sup>35</sup> Rex M. Nettleford, *Caribbean Cultural Identity: The Case of Jamaica. An Essay in Cultural Dynamics* (Jamaica: Institute of Jamaica, 1978) at p.2.

own "inner logic and consistency."<sup>36</sup> Out of this historical circumstance emerged what has been referred to as "creolisation" by Edward Kamau Brathwaite and other scholars which is the cultural interaction and convergence (or "interculturalisation") that accompanied the ongoing social interactions between the variety of peoples in the plantation regions of the Americas.<sup>37</sup> Members of the different populations creatively drew on their diverse cultural heritages in an attempt to adjust to their new natural and social environments. In the process, a Creole culture consisting of both reinterpreted Old World and distinctively local cultural symbols and practices gradually emerged.<sup>38</sup> The steel pan (musical instrument) of Trinidad and Tobago as well as Shakespeare

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<sup>36</sup> *Ibid.* See also Stuart Hall where he stated that "everybody in the Caribbean comes from somewhere else... That is to say, their true cultures, the places they really come from, the traditions that really formed them, are somewhere else. The Caribbean is the first, the original and the purest diaspora": see Stuart Hall, "Negotiating Caribbean Identities" in Brain Meeks and Folke Lindahl, eds, *New Caribbean Thought. A Reader*, (Jamaica, Barbados, Trinidad and Tobago, The University of the West Indies Press: 2001) at pp.27-28. See also Wendy Knepper in "Colonization, Creolization, and Globalization: The Art and Ruses of Bricolage" (2006) Vol.21 Small Axe: A Caribbean Journal of Criticism, 70 where she states that "Caribbean identities, linguistic transformations, religious beliefs, music, cuisine, and aesthetic practices have been shaped by the fragmentation and intermixture of various traditions."

<sup>37</sup> See for example, Edward Brathwaite, *The Development of Creole Society in Jamaica: 1770-1820* (Oxford: Clarendon Press, 1971). Creolisation, according to Lawrence O. Bamikole, can be stated as the "coming together of different elements in an interacting process, producing a new reality or entity which is neither one nor the other of the original elements, but which nevertheless share some features with the original elements": see Lawrence O. Bamikole, "Creolisation and the Search for Identity in Caribbean Philosophy" (2007) Vol.53 No.3 Caribbean Quarterly, 70 at p.76.

<sup>38</sup> See Stephen Stuempfle, *The Steelband Movement. The Forging of a National Art in Trinidad and Tobago* (Philadelphia: University of Pennsylvania Press: 1995) at p.7. Writing in 1998, Verene Shepherd and Glen Richards stated that "approximately twenty – six years after its public launching, Kamau Brathwaite's creole – society model is generally accepted as the leading interpretation of Caribbean society; and as a description of Caribbean society during slavery seems more appealing to those who question the slave society and plantation society constructs. It has been widely incorporated into the scholarship of the region, and resonates in diverse fields of Caribbean Studies, spreading beyond the confines of the discipline of history: see Verene Shepherd and Glen Richards, "Introduction" (1998) Vol.44 Nos.1&2 Caribbean Quarterly, vi at p.vii. "Kamau Brathwaite's intellectual influence has been widely diffused at the international level", according to Shepherd and Richards, "and much of contemporary post-colonial discourse and literary criticism is infused, although not always acknowledged, with the spirit and style of Brathwaite's poetic concept": *ibid.* Mary Louise Pratt conveys Brathwaite's creole – society concept in her use of the term 'transculturation' which she argues

"treats the relations among colonisers and colonised...not in terms of separateness or apartheid, but in terms of co-presence, interaction, interlocking understandings and practices, often within radically asymmetrical relations of power": see Mary Louise Pratt, *Imperial Eyes: Travel Writings and Transculturation* (London and New York: Routledge, 1992) at p.7.

Homi Bhaba's concept of 'hybridity' also seems to share in the spirit and poetic expression of Brathwaite's work when he writes that if

"the effect of colonial power is seen to be the *production* of hybridisation rather than the noisy command of colonialist authority or the silent repression of native traditions – then an all important change of perspective occurs": see Homi Bhaba, "Signs Taken as Wonders" in Bill Ashcroft, *et al*, eds. *The Post – Colonial Studies Reader* (London and New York: Routledge, 1992) at p.35.

Mas (festival) in Carriacou and Jonkunnu (festival) in Jamaica and the Bahamas can all be characterized as “creole” or syncretic cultural products or practices.

Where the criteria for the protection of “traditional cultural expressions” in the Draft TCE Instrument stipulates, *inter alia*, that it be “characteristic of a community’s cultural and social identity and cultural heritage”,<sup>39</sup> is it implicit in this requirement that the cultural heritage of the community be indigenous to the community and the geographic space that that community inhabits?

This point comes into sharper focus when considering the requirements of the Draft TK Instrument where “traditional knowledge” is defined as “the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning *that form part of traditional knowledge systems*, and knowledge embodying traditional lifestyles of indigenous and local communities...”<sup>40</sup> Is it that the reference to “traditional knowledge systems” in the Draft TK Instrument refers to traditional knowledge systems indigenous to the geographic space that the community inhabits? If the answer to that question is yes, then many Caribbean cultural products will not qualify as “traditional knowledge” because they draw on “traditional knowledge systems” which originate from elsewhere.

The other consideration is the reliance on “custom” and a “customary context” in the Draft WIPO Instruments which may not reflect all the realities of how such knowledge evolves,

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<sup>39</sup> The Draft TCE Instrument defines “traditional cultural expressions” as verbal, musical or tangible expressions which are

- (1) the products of creative intellectual activity, including individual and communal creativity;
- (2) characteristic of a community’s cultural and social identity and cultural heritage; and
- (3) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

<sup>40</sup> See Article 3 - Subject Matter of Protection, the full text of which reads as follows:

1. These principles concern protection of traditional knowledge against misappropriation and misuse beyond its traditional context, and should not be interpreted as limiting or seeking externally to define the diverse and holistic conceptions of knowledge within the traditional context. These principles should be interpreted and applied in the light of the dynamic and evolving nature of traditional knowledge and the nature of traditional knowledge systems as frameworks of ongoing innovation.
2. For the purpose of these principles only, the term “traditional knowledge” refers to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.

and its place in contemporary society.<sup>41</sup> Traditional knowledge can exist, and is transmitted, in multiple contexts. As one writer remarked – “...no one’s life is entirely traditional and no one’s life is entirely modern....Traditional versus modern is better thought of as opposite ends of a scale...Each community fits somewhere along the scale, in some combination of modern and traditional.”<sup>42</sup> The case of the steel pan, for example, shows that knowledge may transcend its folkloric or tradition base (or its traditional/customary context), yet still be culturally significant, and have the same strong connections with its source community or country.

If concessions are made within the proposed Caribbean regional framework to account for the syncretic nature of much of the cultural products and practices that exist in this region, and other ways of maintaining and transmitting traditional knowledge which are not governed by “custom” exclusively or at all, would that mean that those cultural products will only receive protection within the region but excluded from consideration as traditional knowledge within the wider international sphere should the Draft WIPO Instruments be adopted in their present form?

## **JUSTIFYING TRADITIONAL KNOWLEDGE PROTECTION**

### **Introduction**

The question of whether and why the protection of traditional knowledge is justified, and if so, how, has not yet been given the extensive *dedicated* academic attention that has been given to theories justifying property and intellectual property protection. Notwithstanding this, there is a growing body of literature dealing with the protection of traditional knowledge, usually from the perspective of the adequacy or inadequacy of the conventional intellectual property system, and *sui generis* legislation, to deal with this emerging area. Writers generally tend to take traditional knowledge protection as a given, and not bother to articulate or explain their reasons for adopting

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<sup>41</sup> See, for example, the criteria for protection proposed in the Draft Legal Instrument for SAARC Countries on the Protection of Traditional Knowledge (the “draft SAARC Framework”) (as compared to those proposed in the Draft TK Instrument) which specifies that protection should extend to at least knowledge which is generated, preserved and transmitted in a traditional context *or through recognised courses of study of traditional medicine*.

<sup>42</sup> See Michael J. Finger, “Introduction and Overview” in J. Michael Finger and Philip Schuler, eds., *Poor People’s Knowledge. Promoting Intellectual Property in Developing Countries* (Washington, DC: The World Bank and the Oxford University Press, 2004) at pp.31-32.

such a position. As such, justifications for protecting traditional knowledge are left to be gleaned from the more general discourse on the mechanics of traditional knowledge protection.<sup>43</sup>

The protection of cultural identity/preservation of cultural diversity argument; the equitable sharing of benefits argument; the respect and parity argument, and the “quality of life” argument” are some specific justifications which are associated with the protection of traditional knowledge.<sup>44</sup>

### **The “protection of cultural identity/preservation of cultural diversity” argument**

One of the characteristics of traditional knowledge is that it is linked to a source community. The other is that such knowledge is said to have cultural significance in that it is an aspect of the cultural identity of that source community. Therefore, one of the arguments in favour of the protection of traditional knowledge is that it directly or (at least) indirectly involves the protection of cultural identity. It has been suggested that where rights akin to the moral right of attribution are a part of the schema of protection for traditional knowledge<sup>45</sup> this will have the effect of maintaining a link between the traditional knowledge form (a vehicle of identity) and its source. Further, not only is the embodiment of cultural identity a justification for protecting traditional knowledge, it is also a criterion for protection. Some draft traditional knowledge laws require that only knowledge that is reflective of the cultural identity of the source community will be protected.<sup>46</sup>

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<sup>43</sup> There are exceptions to this general observation. Graham Dutfield sought to outline the various arguments put forward for justifying traditional knowledge protection: see Graham Dutfield, “Protecting Traditional Knowledge: Pathways to the Future” The International Centre for Trade and Sustainable Development (ICTSD) Programme on IPRs and Sustainable Development, Issue Paper No.16, June, 2006 (“Dutfield, Pathways to the Future”).

<sup>44</sup> Although the various justifications are presented separately in the discussion, they are not necessarily articulated as such in the literature.

<sup>45</sup> Prior to the development of the Draft WIPO Instruments, it was stated that “analogous to copyright, ...[traditional knowledge] rights should also comprise material and moral rights. Strong moral rights in ...[traditional knowledge] may be indeed a crucial component of future *sui generis* systems because of their particular role in the protection and preservation of the cultural identity of traditional communities, including those elements of ...[traditional knowledge] that are not be commercially used:” see WIPO Secretariat, “Elements of a *Sui Generis* System for the Protection of Traditional Knowledge” IGC Fourth Session, Geneva, December 9 to 17, 2002, WIPO/GRTKF/IC/4/8, at p.27 (“WIPO/GRTKF/IC/4/8”).

<sup>46</sup> See, for example, the Draft TK Instrument, Article 4, which provides that protection of traditional knowledge should be extended to at least that knowledge which is integral to the cultural identity of an indigenous or traditional community or people.

The connection between cultural identity and cultural diversity<sup>47</sup> has been expressly made in the Preamble to the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (“the 2005 Convention”) which refers to the embodiment of diversity in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies making up humanity.<sup>48</sup> And, there is the view that the protection of traditional knowledge, and by extension, cultural identity, should be encouraged because it contributes to cultural diversity which is a public good because it (cultural diversity) promotes social cohesion and economic development. “Monocultures are as dangerous to democracy as they are to agriculture”.<sup>49</sup>

It is also suggested that cultural diversity provides diverse cultural and artistic sources to enable ongoing creativity.<sup>50</sup> That argument has utilitarian undertones reminiscent of economic incentive arguments for the protection of intellectual property. However, in this instance, the “economic rewards” are a possible consequence of the protection of traditional knowledge (discussed below) and not the catalyst for the creation of more (and arguably diverse) creations.

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<sup>47</sup> Cultural diversity refers to the various ways in which the cultures of groups and societies find expression which is passed on within and among them. It is manifest through artistic creation, production and dissemination by various means and technologies: see Article 4 (1) of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005. Also, one of the objectives of the Draft TCE Instrument states that the protection of traditional cultural expressions should aim to contribute to the promotion and protection of the diversity of cultural expressions: see the Draft TCE Instrument, Objective (x).

<sup>48</sup> See the Preamble which states, *inter alia*,

“Taking into account that culture takes diverse forms across time and space and that this diversity is embodied in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies making up humanity”

<sup>49</sup> See Rosemary J. Coombe, “Protecting Cultural Industries to Promote Cultural Diversity: Dilemmas for International Policymaking Posed by the Recognition of Traditional Knowledge” in Keith E. Maskus and Jerome H. Reichman, *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005) at p.612 (Coombe, “Protecting Cultural Industries”). The preservation of cultural diversity is given special priority by indigenous peoples particularly in terms of their languages which are understood to represent most of the world’s remaining linguistic diversity: *ibid.*, at p.613. “Some five to seven thousand languages are spoken in the world today and the majority of these are the mother-tongues of indigenous groups. Linguists fear that in the next hundred years many of these will simply vanish. To the indigenous groups who speak them, these languages are more than a means of communication; they confer on their speakers a sense of identity and uniqueness”: see “Saving Indigenous Languages” <http://www.un.org/esa/socdev/media/articles/unpfii-artjan08.html>. Loss of indigenous languages means a loss of linguistic diversity, and consequently, a loss of cultural diversity.

<sup>50</sup> See Coombe, “Protecting Cultural Industries”, at p.612. The intention is that this will not be done in an exploitative manner: see the 2005 Convention, Article 1 (b), which states that the objectives of the Convention include the creation of conditions for cultures to flourish and to freely interact in a mutually beneficial manner.

## **The “equitable sharing of benefits” argument**

There is a widely held belief that traditional knowledge is vulnerable to commercial and other forms of exploitation by those external to the source community. This fuels demands for the protection of such knowledge that respects and responds to its particular characteristics, and to the needs of the holders or custodians of such knowledge.<sup>51</sup>

Traditional knowledge holders have asserted that they should benefit from any earnings resulting from the commercial use of their knowledge, and have advocated for a regime of protection which includes a system of equitable benefit-sharing.<sup>52</sup> Although the idea of equitable benefit-sharing emphasizes fairness in the distribution of resulting benefits, many who advocate the protection of traditional knowledge are equally concerned with matters of procedural fairness, in particular, that the source community is given the right to determine whether, and in what manner, traditional knowledge can be used.<sup>53</sup>

The equitable sharing of benefits is advocated in the CBD and the Draft TK Instrument. In the latter, Article 6 establishes a general principle that traditional knowledge holders are entitled to the sharing of benefits arising from commercial or industrial uses of their traditional knowledge.<sup>54</sup> Non-commercial use is also covered.<sup>55</sup> This accords with the Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising out of their Utilization (“the Bonn Guidelines”), which are internationally agreed voluntary guidelines on biodiversity-related traditional knowledge.<sup>56</sup>

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<sup>51</sup> See Taubman, “Saving the Village” at p.523.

<sup>52</sup> This is reflected in the Draft TCE Instrument, Objective (iv) and the Draft TK Instrument, Objective (xii), which deal with the equitable sharing of benefits. The latter fleshes out that principle more so than the former since the equitable sharing of benefits is more commonly associated with the use of traditional knowledge as opposed to traditional cultural expressions, although it is applicable to both.

<sup>53</sup> See Taubman, Saving the Village, at p.523.

<sup>54</sup> See the Draft TK Instrument, Article 6.

<sup>55</sup> Further, different benefit-sharing arrangements are available for commercial and non-commercial use. An example of possible benefits arising in the latter instance is the involvement of the source community in research and educational activities, and access to research outcomes.

<sup>56</sup> See CBD, COP Decision VI/24, Annex, Appendix II, where examples of monetary and non-monetary benefits are provided. The Bonn Guidelines were adopted in April, 2002.



There are economic benefits which can accrue from the commercial exploitation of the steel pan of Trinidad and Tobago, for example. The *undeveloped* global market for the steel pan was estimated at 64 million Trinidad and Tobago dollars (approximately 10 million United States Dollars).<sup>57</sup> Compared to the revenue generated from the energy sector in Trinidad and Tobago, this is minimal. However, the injection of a percentage of the global potential revenue from the commercial exploitation of the steel pan into the local steel pan sector can go a long way towards contributing to the self-sufficiency of that sector, and reducing its dependence on annual government subventions.

### **The “respect and parity” argument**

The argument has been made that traditional knowledge should be protected to give it parity with other forms of knowledge which attract protection via a well established system of intellectual property rights. The promotion of “respect” forms part of the stated objectives of the protection of traditional cultural expressions<sup>58</sup> and traditional knowledge<sup>59</sup> in the Draft WIPO Instruments.

Some academics believe the initiatives to recognize rights to traditional knowledge within the national and transnational contexts really concern power relations played out in the contest for ownership and control of resources between communities and the State, “developing” and “developed” nations, and North and South.

Others, like Vandana Shiva, believe that the initiatives to protect traditional knowledge are reflective of efforts to reverse or address the effect of colonialism on traditional knowledge. Colonialism, according to Shiva, “has been a contest over the mind and the intellect...”<sup>60</sup> Under the colonial influence, the intellectual heritage of non-Western societies was devalued and what was a plurality of knowledge systems, characteristic of non-Western societies, was transformed

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<sup>57</sup> See Mr. Michael P. Cooper, President, Panland Trinidad and Tobago Limited (formerly Trinidad and Tobago Instruments Limited), Cor. Eastern Main Road and Dorata Street, Laventille, Trinidad and Tobago, March 3<sup>rd</sup>, 2006 (“the Cooper Interview”).

<sup>58</sup> See the Draft TCE Instrument, Objective (ii).

<sup>59</sup> See the Draft TK Instrument, Objective (ii).

<sup>60</sup> See Vandana Shiva, “Foreword: Cultural Diversity and the Politics of Knowledge” in George J. Sei, Budd L. Hall and Dorothy Goldin Rosenberg, eds, *Indigenous Knowledges in the Global Contexts: Multiple Readings of our World* (Toronto; Buffalo; London: Published in association with the University of Toronto Press, 2000) at p. vii.

into a hierarchy of knowledge systems.<sup>61</sup> Western knowledge systems were considered to be based on science and therefore superior to any non-Western system which did not conform therewith. “When knowledge plurality mutated into knowledge hierarchy, the horizontal ordering of diverse but equally valid systems was converted into vertical unequal systems, and the epistemological foundations of Western knowledge were imposed on non-Western knowledge systems with the result that the latter were invalidated.”<sup>62</sup>

A plurality of knowledge systems suggests, according to Shiva, that one system should not serve as the benchmark for all systems, and that “diverse systems need not be reduced to the language and logic of Western knowledge systems”<sup>63</sup> and that each system of knowledge has its own logic and epistemological foundations.<sup>64</sup>

Thus, the proposed regime of protection for traditional knowledge cannot be guided exclusively by constructs of “rights” and “rights-holders” buttressed by naturalist and positivist legal philosophies which tend to exclude other constructs based on identity, custom, tradition, and community, which are relevant to any legal framework of protection for traditional knowledge. In an effort to accommodate such criticisms, recent WIPO proposals to protect traditional knowledge have attempted to merge intellectual property constructs with customary law and community control of traditional knowledge.

Nevertheless, the legitimizing effect of a regime of “rights” to traditional knowledge cannot be ignored. Law determines “who” and “what” attains the status of legitimacy and “who” and “what” does not.<sup>65</sup> Thus, the legal protection of traditional knowledge will ensure that traditional knowledge is recognized as “protectable knowledge” and traditional knowledge

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<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> See Vandana Shiva, “Foreword: Cultural Diversity and the Politics of Knowledge” in George J. Sei, Budd L. Hall and Dorothy Goldin Rosenberg, eds., *Indigenous Knowledges in Global Contexts: Multiple Readings of our World* (Toronto, Buffalo, London: Published in association with the University of Toronto Press, 2000) at p.viii.

<sup>64</sup> See Vandana Shiva, “Foreword: Cultural Diversity and the Politics of Knowledge” in George J. Sei, Budd L. Hall and Dorothy Goldin Rosenberg, eds., *Indigenous Knowledges in Global Contexts: Multiple Readings of our World* (Toronto, Buffalo, London: Published in association with the University of Toronto Press, 2000) at p.viii.

<sup>65</sup> See Richard F. Devlin, “Mapping Legal Theory” (1994) Vol. XXXII No.3 *Alberta Law Review*, 602 at 608.

source communities are acknowledged as having the capacity to hold and enforce rights over their knowledge, if they choose to do so.

### **The “quality of life” argument**

The “quality of life” argument suggests that traditional knowledge should be protected because such protection can contribute to the improvement of the quality of life for the communities from which such knowledge originated. According to Dutfield, traditional knowledge is valuable, first and foremost, to indigenous and local communities that depend on such knowledge for health, livelihoods and general wellbeing. Therefore, a traditional knowledge regime that encourages the conservation and continued use of traditional knowledge relating to health and food production could potentially improve the lives of millions.<sup>66</sup> Dutfield also refers to traditional low input agricultural systems, based on extensive and applied knowledge about natural processes and local ecosystems which have successfully enabled millions of people to subsist for thousands of years in some of the most hostile environments.<sup>67</sup>

### **The prevention of biopiracy and the preservation of biological diversity**

The prevention of biopiracy and the preservation of biological diversity are justifications for a specific category of traditional knowledge, namely, knowledge related to biological and genetic resources.

“Biopiracy” has emerged as a term to describe the ways that corporations (usually from developed countries) “free ride” on or commercially exploit the genetic resources, technology, and associated traditional knowledge of indigenous and traditional communities (usually from developing countries) without sharing the benefits of such commercialisation or sometimes without acknowledging the communities as the source of the genetic resources, technology and associated knowledge.<sup>68</sup> “Free-riding” can involve the misappropriation of genetic resources

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<sup>66</sup> See “Protecting Traditional Knowledge: Pathways to the Future” The International Centre for Trade and Sustainable Development (ICTSD) Programme on IPRs and Sustainable Development, Issue Paper No.16, June, 2006 (“Pathways to the Future”) at p.3, where he cites WHO data which suggests that 80% of the world’s population depends on traditional medicine for its primary health needs: *ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> See Dutfield, “Pathways to the Future”, at p.6. Dutfield remarked that biopiracy, is an imprecise term and that there are good reasons to keep it so, at least in the international arena. Both matters of law and fairness are intertwined in determining whether an act of biopiracy has been committed. “[W]e need to acknowledge that where the line should be drawn between an act of biopiracy and a legitimate practice may not be easy to draw [and]

and/or associated traditional knowledge through the acquisition of patent rights by those external to the community from which the genetic resources and/or associated knowledge originated, and the unauthorised collection of genetic resources and/or associated traditional knowledge by those external to the community.<sup>69</sup>

Related to the “prevention of biopiracy” argument is the “preservation of biodiversity” argument. Environmental benefits, in addition to commercial applications, have been shown to be derived from the protection of traditional knowledge. The WIPO Report referred to evidence of this emanating from studies of local communities. It stated that “much of the world’s crop diversity is in the custody of farmers who follow age-old farming and land use practices that can conserve biodiversity and provide other local benefits, such as diet diversity, income generation, production stability... reduced insect and disease incidence, efficient use of labour...[increased] production with limited resources and [the] maximization of returns with low levels of technology.”<sup>70</sup>

## CONCLUDING THOUGHTS

The discussion of traditional knowledge, its meaning, why and how it should be protected, continues to engage traditional knowledge holders, governments, non-governmental organizations, academics, practitioners, and all other conceivable stakeholders, and will probably engage all concerned for a very long time. Opinions differ within and among communities and countries. This should not be seen as a disincentive but as part of the process of and an opportunity for forging consensus. At present, the international community, through WIPO’s IGC, is in the process of building that consensus with the ongoing development of the Draft WIPO Instruments. The outcome of those deliberations may be unknown for some time, and as the Peter Drahos reminds us, “The Paris and Berne Conventions each represent a 100 or so years

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the difficulty in drawing the line is compounded by the vagueness in the way the term is applied”: *ibid.* “...[I]f you cannot agree on what it is, you cannot measure it. Neither can you agree on what should be done about it”: *ibid.*, at p.7.

<sup>69</sup> See Dutfield, “Pathways to the Future”, at p.6.

<sup>70</sup> See the 2001 WIPO Report at p.214 and the references at note 13.

of intensive State negotiations...”<sup>71</sup>

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<sup>71</sup> See Peter Drahos, “Towards an International Framework for the Protection of Traditional Group Knowledge and Practice” Draft Paper (prepared at the request of the Commonwealth Secretariat) UNCTAD-Commonwealth Secretariat Workshop on “Elements of National *Sui Generis* Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovation and Practices and Options for an International Framework” Geneva, 4<sup>th</sup>-6<sup>th</sup> February, 2004, [http://cgkd.anu.edu.au/menus/PDFs/Drahos\\_theframework.pdf](http://cgkd.anu.edu.au/menus/PDFs/Drahos_theframework.pdf) “International Framework” at p.24.